IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 18, 2001 Session

STATE OF TENNESSEE v. STEVE GASS

Appeal from the Circuit Court for Rutherford County
No. 47334 J.S. Daniel, Judge

No. M2000-02008-CCA-R3-CD - Filed January 9, 2002

The defendant, Steve Gass, was indicted on two counts of rape of a child and two counts of aggravated sexual battery. See Tenn. Code Ann. §§ 39-13-522, 39-13-504. He was convicted of one count of rape of a child, one count of aggravated sexual battery, and one count of attempted rape of a child. The trial court ordered sentences of 21 years, nine years, and 11 years, respectively. In this appeal of right, the defendant presents several evidentiary issues; asserts that the evidence was insufficient; argues that the trial court should have granted a new trial based on newly discovered evidence and prosecutorial misconduct grounds; contends that the trial court erred by not granting a mistrial based on a prejudicial comment made by a potential juror during voir dire; and submits that the cumulative effect of the alleged errors impugns the reliability of the verdicts. The judgments of the trial court are affirmed.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JOHN EVERETT WILLIAMS, JJ., joined.

Gerald L. Melton, District Public Defender, and Jeffrey S. Henry, Assistant District Public Defender, for the appellant, Steve Gass.

Paul G. Summers, Attorney General & Reporter; Elizabeth T. Ryan, Assistant Attorney General; and Paul A. Holcombe, III, and William S. Osborne, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Tina Litchford, the victim's[1] mother, testified that she and her two children began sharing a residence with the defendant in approximately October of 1997. In March of 1999, Ms. Litchford, the defendant, and the victim, TL, age 6, were living with the defendant's mother. The victim's older

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[1] It is the policy of this court not to identify child sex crime victims by name.

brother, who was in his early teens, lived with relatives in Nashville. Although the defendant's drug and alcohol problems had placed a strain on their relationship, Ms. Litchford had given the defendant "another chance." On March 20, 1999, Ms. Litchford and the defendant had worked on a new apartment they intended to occupy and had returned to the defendant's mother's residence between 5:00 and 6:00 p.m. Afterwards, the two went to the apartment of a neighbor, Regina Clark. Ms. Litchford testified that she left the defendant at Ms. Clark's apartment between 8:00 and 9:00 p.m. When she returned to their residence, the victim was asleep on the couch.

At trial, Ms. Litchford testified that the defendant arrived at the apartment at approximately 2:00 a.m. accompanied by Ms. Clark's boyfriend, identified in the record only as "Bubba." She recalled that she had to ask the men to be quiet more than once and remembered that Bubba left 10 to 15 minutes later. When she got out of bed to check whether the door was locked, she saw the defendant lying on the floor between the couch and the television, watching the Playboy Channel, which was scrambled. She recalled calling him "sick" and then returning to her bed. Later, she heard the voice of the defendant instructing the victim to open her mouth. At one point, the defendant said, "Don't cry, [T.L.], open your mouth." Her initial thought was that the defendant was attempting to give the victim medicine; when, however, she walked into the living room, the victim was in a fetal position on the couch and the defendant was in front of her with his penis completely exposed. Ms. Litchford testified that she immediately moved the victim into her bedroom. The defendant, who had closed his pants and denied any wrongdoing, entered her bedroom and said, "Yeah, I raped your kids, and next I'll kill them." When the defendant returned to the living room and "passed out," Ms. Litchford called the police. On cross-examination by the defense, Ms. Litchford acknowledged that she was angry at the defendant during the evening preceding the offense because his ex-girlfriend had called him and asked for "a ride."

Barbara Speller-Brown, a pediatric nurse practitioner at Our Kids Center in Nashville, testified that she examined the victim on March 24, 1999. She recalled that a social worker at the center obtained the victim's medical history. According to Ms. Speller-Brown, the victim reported that the defendant, whom she identified as her "father," had made her suck his "private" and had touched her "monkey," or genital area, with his fingers. She stated that she performed a complete physical examination of the victim and that the exam was normal. Ms. Speller-Brown testified that there was no sign of injury to the victim's genital area.

Ms. Speller-Brown acknowledged that she could neither confirm nor deny the victim's allegations on the basis of the physical exam. She reported that she found no sexually transmitted diseases and no bruises, redness, or lacerations in the victim's mouth. She testified that 80% of sexually abused children suffer no physical injury as a result of the abuse. Ms. Speller-Brown recommended counseling for both the victim and her mother.

The victim, who was seven years of age and in the first grade at the time of trial, recalled that the defendant first touched her in a "bad way" when they lived in a trailer. She recalled that she had been awakened by a storm, which frightened her, and that when she called for the defendant, he got into bed beside her. She testified that when she awakened again later, the defendant offered her a

pet cat if she would "suck his private," which she did. The victim remembered that on another occasion, the defendant touched her "private" under her clothing while she was on the loveseat in the living room of the trailer.

The victim also testified to two instances of sexual abuse that occurred in the residence of the defendant's mother. She recalled that on one evening, while she was sleeping on the couch, the defendant put his "private" "against [her] mouth." The victim stated that "yellow stuff" came from the defendant's "private" and that it got on her leg and blanket. She remembered that the defendant instructed her not to tell her mother or brother. As to the March 21, 1999, incident, the victim recalled the defendant's instructing her to open her mouth so that he could put his "private" inside. When she refused, her mother came in and carried her to a bedroom.

Jeff Peach, a detective with the Smyrna Police Department, testified that he interviewed the victim at approximately 4:00 a.m. on March 21, 1999. Afterwards, he went to the defendant's mother's apartment, where he found the defendant asleep on the couch. Detective Peach recalled that he advised the defendant of his Miranda rights and took him into custody. When he asked the defendant if he knew why he was being arrested, the defendant responded, "Have I robbed a bank or something?" After signing a Miranda rights waiver, the defendant told the detective that he had no recollection or knowledge of sexually abusing the victim. Detective Peach remembered that he then transported the defendant to the Sheriff's Department and sent the victim's blanket to the TBI crime laboratory to be tested for semen. None was found.

Detective Peach stated that on the day following the arrest, Detective Duke, also of the Smyrna Police Department, accompanied him to interview the defendant a second time. He recalled that Detective Duke knew the defendant and thought that the defendant might feel more comfortable if he was present. Again, the defendant was read his Miranda rights and signed a waiver of rights form. According to Detective Peach, the defendant was too emotionally overwrought to speak clearly. The detectives returned the next day. When they arrived, the defendant remarked that he was afraid that the detectives had forgotten about him. After being Mirandized a fourth time and signing a third waiver form, the defendant provided the following statement:

> On March[] 21, 1999[,] I[,] Stephen Gass[,] came from across the hall at Gina's. I went home [and] sat on the couch. I cut the t.v. on but went to sleep. I woke back up to find myself standing over [T.L.], myself exposed. Tina came in and asked me to zip my pants or something [and] I got back on the couch and went to sleep. I am so sorry for what I've done. This isn't like me. I feel I have ruined my life [and] Tasha's as well as my mother[']s and Tina's. I need help!! I want some help with all of this so that it doesn't ever happen again. I can['t] say I'm sorry enough times for what I've done. Somebody please help me.

During cross-examination, Detective Peach agreed that at the time of his arrest, the defendant appeared to have "some type of intoxicants about his person." He also acknowledged that he did not

tape record any of his interviews of the defendant. During the third interview, he informed the defendant that he would make his cooperation known to the trial court.

Janie Foster, the defendant's mother, was the only witness called on behalf of the defense. She testified that she was in her bedroom with the door closed during the early morning hours of March 21 when she heard loud voices. Ms. Foster stated that she heard Tina Litchford ask the defendant "what the hell he was doing," before returning to her bedroom. She recalled getting out of bed, knocking on Ms. Litchford's bedroom door, and entering the room. Ms. Foster testified that Ms. Litchford and the victim were together and that the defendant was on the couch asleep. She maintained that the last line of the written statement she had given to police, that she had heard the defendant "telling [the victim] to open her mouth," was erroneous. On cross-examination, Ms. Foster acknowledged that she had not seen what the defendant was doing to the victim. It was her opinion that she had signed her statement in error because she "was upset that morning" and "probably just glanced over it."

I

The defendant first claims that the trial court erred by finding that the victim, age seven at the time of the trial, was competent to testify. Competency of a witness is controlled generally by Tennessee Rule of Evidence 601, which provides that "[e]very person is presumed competent to be a witness except as otherwise provided in these rules or by statute." "Virtually all witnesses may be permitted to testify: children, mentally incompetent persons, convicted felons." Tenn. R. Evid. 601, Advisory Commission Comment (emphasis added). Tennessee Rule of Evidence 603 provides as follows:

> Before testifying, every witness shall be required to declare that the witness will testify truthfully by oath or affirmation, administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.

The common law rule is that if the child "understands the nature and meaning of an oath, has the intelligence to understand the subject matter of the testimony, and is capable of relating the facts accurately," he or she is deemed competent to testify. State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993); see also State v. Howard, 926 S.W.2d 579, 584 (Tenn. Crim. App. 1996), overruled on other grounds by State v. Williams, 977 S.W.2d 101 (Tenn. 1998); State v. Fears, 659 S.W.2d 370, 375 (Tenn. Crim. App. 1983).

Through direct questioning, the trial court determined that the victim knew the difference between the truth and a lie. She stated that a lie placed her "in trouble" and that the truth did not. Although she could not define the term "oath," she understood the term "promise" and promised to tell the truth. When the defense argued that the victim's degree of competence fell short of the requirements of Rule of Evidence 603, the trial court imposed additional questions:

Q. I may have used some words that you didn't understand. If I do, would you tell me that you don't understand them?
A. Yes.
Q. Okay. Then we'll go back to this question. Do you know what a lie is?
A. Yes.
Q. Okay. And do you know what the truth is?
A. Yes.
Q. All right. Do you promise to tell the truth?
A. Yes.
Q. And what happens if you tell a lie?
A. You'll get in trouble.
Q. Okay. . . . [A]s to the questions that are asked of you, will you tell nothing but the truth?
A. Yes.

The determination of the competency of a minor witness is properly a matter within the discretion of the trial judge, who has the opportunity to observe the witness first-hand. The decision of a trial judge will not be overturned absent a showing of abuse of that authority. State v. Caughron, 855 S.W.2d 526, 538 (Tenn. 1993); State v. Braggs, 604 S.W.2d 883, 885-86 (Tenn. Crim. App. 1980). In our view, the record demonstrates that the victim understood the nature of her oath. See Howard, 926 S.W.2d at 584; State v. Mack A. Atkins, No. 03C01- 9208-CR-00285 (Tenn. Crim. App., at Knoxville, June 17, 1993) (holding that trial court properly found six-year-old witness competent to testify at trial). While the trial court should have conducted a jury-out hearing to determine the victim's competency to testify, see Tenn. R. Evid. 104(c),[2] the victim established her competency as a witness, see Ballard, 855 S.W.2d at 560 (stating that the "purpose of determining competency of the witness in child sexual abuse cases is to allow a victim to testify if it can be determined that the child understands the necessity of telling the truth while on the stand"). In Ballard, our supreme court upheld the trial court's determination of competency, finding that "[a]lthough the trial judge did not follow verbatim the requirements in State v. Fears . . . he did determine that the child appreciated the difference between truth and falsehood and that the child promised to tell the truth during questioning." Id. (citation omitted). This case cannot be distinguished from the holding in Ballard.

The defendant also asserts that the trial court erred by allowing the assistant district attorney general to ask the victim leading questions during direct examination. This court has long recognized that it is within a trial court's discretion to permit leading questions of child sex offense victims. See Swafford v. State, 529 S.W.2d 748, 749 (Tenn. Crim. App. 1975). Here, defense counsel objected to five of the state's questions as leading. The trial court sustained the first objection, made no ruling on the second objection while allowing the state to proceed, and overruled the last three objections. In our view, the record establishes that the questions at issue were primarily

[2]The state erroneously asserts that the trial court conducted a jury-out hearing. There is no indication in the transcript that the jury was excused from the courtroom prior to the voir dire as to the victim's competency.

intended to provide some context for the more critical portions of the victim's testimony. For example, the state asked the victim whether the defendant had touched her in a "bad way" while she and her family were living with the defendant's mother. Later, he asked her to tell him about "the last time anything bad happened" with the defendant. While these questions may qualify as leading, they were not overly suggestive of the desired responses. See, e.g., State v. Dearry, No. 03C01-9612-CC-00462 (Tenn. Crim. App., at Knoxville, Feb. 6, 1998) (permitting prosecutor to ask child victim whether she had "touch[ed] [the defendant] with [her] mouth"). In consequence, this issue would not serve as a basis for relief.

II

Next, the defendant contends that the trial court erred by permitting testimony offered by nurse practitioner Barbara Speller-Brown. In a "multi-layered" hearsay argument, the defendant first complains that the trial court should have excluded all of the medical records generated by Our Kids Center because the custodian was not present at trial and the nurse practitioner was not qualified to establish a foundation for admission under the business records exception. See Tenn. R. Evid. 803(6). He also argues that the victim's medical history should have been excluded because her statements were not made for purposes medical diagnosis and treatment. See Tenn. R. Evid. 803(4).

Initially, the defendant did not object to the medical records when they were tendered as an exhibit by the state. In fact, the record reflects that at the close of Ms. Speller-Brown's testimony, the state announced an agreement with the defense that the medical history provided by the victim's mother would be redacted prior to presentation of the records to the jury. The defendant's failure to object at trial has resulted in waiver of this issue. See Tenn. R. App. P. 36(a).

The custodian of the disputed records was not called as a witness at trial and was, in fact, statutorily exempt from subpoena to trial upon compliance with certain procedural requirements. See Tenn. Code Ann. § 24-9-101(8).[3] Under the Hospital Records as Evidence Act, the state submitted an affidavit executed by the custodian in response to a subpoena duces tecum. Its content complied fully with Tennessee Code Annotated § 68-11-405, which provides in pertinent part as follows:

> (a) The records shall be accompanied by an affidavit of a custodian stating in substance:
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> (1) That the affiant is duly authorized custodian of the records and has authority to certify the records;
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> (2) That the copy is a true copy of all the records described in the subpoena;

[3] After this trial, Tennessee Rule of Evidence 803(6) was amended to allow for certification of records in compliance with new Rule 902(11) "or a statute permitting certification." As amended, the rule "eliminates the need to call the custodian of records as a witness[,] . . . a procedure [that] has been in effect by statute for medical business records." Tenn. R. Evid. 803, 2001 Advisory Commission Comment. "Read in conjunction with Rule 803(6), new Rule 902(11) allows affidavits by custodians to establish the foundation for business records." Tenn. R. Evid. 902, 2001 Advisory Commission Comment.

(3) That the records were prepared by the personnel of the hospital or community mental health center, staff physicians, or persons acting under the control of either, in the ordinary course of hospital or community mental health center business at or near the time of the act, condition or event reported therein; and

(4) Certifying the amount of the reasonable charges of the hospital or community mental health center for furnishing such copies of the record.

Tenn. Code Ann. § 68-11-405(a). The state provided a copy of the records to defense counsel. It is not apparent from this record, however, whether the remainder of the requirements of the Hospital Records as Evidence Act, such as the sealing of the documents, were met.

Tennessee Rule of Evidence 803(6) provides an alternative method for the admission of medical records. See Witter v. Nesbit, 878 S.W.2d 116, 122 (Tenn. Ct. App. 1993). The "business records" exception to the hearsay rule provides as follows:

> Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation in any form of acts, events, conditions, opinions, or diagnoses made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes every kind of business, institution, association, profession, occupation, and calling, whether or not conducted for profit.

Tenn. R. Evid. 803(6) (Lexis 1999). Ms. Speller-Brown testified that the medical records offered by the state were in fact those generated as a result of the victim's treatment at Our Kids Clinic. She did not, however, say whether the records were kept in the course of a regularly conducted business activity or indicate when they were generated. By failing to make a contemporaneous objection, however, the defendant foreclosed any opportunity for the state to remedy the omission. Under these circumstances, the defendant is not entitled to appellate relief.

The defendant next argues that the medical history taken from the victim qualifies as inadmissible hearsay and should have been redacted from the Our Kids Center records. He contends that the statements were not made for purposes of medical diagnosis and treatment, see Tenn. R. Evid. 803(4), because nurse practitioner Barbara Speller-Brown was not statutorily qualified to make a diagnosis or provide treatment. The defendant insists that the victim was seen at Our Kids Center only for purposes of "evaluation."

Initially, hearsay within hearsay (statements made by the victim contained within the medical records) "is not excluded . . . if each part of the combined statements conforms with an exception

to the hearsay rule . . . ." Tenn. R. Evid. 805. An exception to the rule against hearsay for statements made for purposes of medical diagnosis and treatment is set out in Tennessee Rule of Evidence 803(4):

> Statements for Purposes of Medical Diagnosis and Treatment. Statements made for purposes of medical diagnosis and treatment describing medical history; past or present symptoms, pain, or sensations; or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis and treatment.

In State v. Livingston, our supreme court ruled as follows:

> The rationale for the medical diagnosis and treatment hearsay exception is that such declarations are deemed reliable because the declarant is motivated to tell the truth; that is, the declarant makes the statements for the ultimate purpose of receiving proper diagnosis and treatment. Generally, (1) the statement must be made for medical diagnosis and treatment; (2) the statement may include extensive information about symptoms, pain, or sensation; and (3) the statement is admissible only "insofar as reasonably pertinent to diagnosis and treatment."

907 S.W.2d 392, 396 (Tenn. 1995) (emphasis in original) (citation omitted); see also State v. Rucker, 847 S.W.2d 512, 516 (Tenn. Crim. App. 1992). A child victim's statements identifying a sex abuser are relevant to diagnosis and treatment because the risk of recurrent abuse and the nature and extent of psychological injuries are often dependent upon the identity of the accused. See Rucker, 847 S.W.2d at 518-19; State v. Kenneth Chambly, No. E2000-01719-CCA-R3-CD, slip op. at pp. 5-6 (Tenn. Crim. App., at Knoxville, Sept. 7, 2001).

Citing Tennessee Code Annotated § 63-7-103, the defendant first argues that the victim's statements were not made for the purpose of medical diagnosis and treatment because Ms. Speller-Brown, a nurse practitioner, was not authorized to make a diagnosis or treat the victim. The statute provides, in pertinent part, as follows:

> Notwithstanding the provisions of subsection (a), the practice of professional nursing does not include acts of medical diagnosis or the development of a medical plan of care and therapeutics for a patient, except to the extent such acts may be authorized by §§ 63-1-132, 63-7-123 and 63-7-207.

Tenn. Code Ann. § 63-7-103(b).

This court has previously rejected an identical argument. In State v. Hunter, 926 S.W.2d 744 (Tenn. Crim. App. 1995), the defendant contended that Tennessee Rule of Evidence 803(4) was inapplicable to statements made to non-physicians. At trial, a nurse practitioner employed by Our Kids Clinic was allowed to testify regarding the medical history given by one of the victims to the

staff social worker. The defendant argued that because nurse practitioners have only limited power to prescribe drugs and no licensure authority to make a medical diagnosis, the testimony should have been excluded. This court, however, found no error:

> The "medical diagnosis and treatment" hearsay exception, as discussed in [State v.] Barone, limited the nature of the evidence to physical complaints rather than those of a mental or emotional nature. Thus, a psychologist was not permitted to testify to the history of sex abuse provided by his patient. The focus, however, was not so much upon who received the statements as to why they were given. . . .

Id. at 747; see also State v. Williams, 920 S.W.2d 247, 256 (Tenn. Crim. App. 1995) (holding that victim's statements to nurse practitioner could be admitted as hearsay exception where made for diagnosis and treatment of medical or physical problem).

Recently, in State v. Gordon, our supreme court upheld the admission of a medical history taken from a child sex abuse victim under similar circumstances:

> [T]he nurse practitioner, Sue Ross, testified that the clinic's standard procedure is for a psychologist, social worker, or the nurse practitioner to interview the child and obtain a history which is used in the examination. The victim in this case was interviewed by a child psychologist. Although Ross was not present during the interview and did not take a separate medical history of her own, she relied upon the history taken by the psychologist.
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> * * *
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> The nurse practitioner testified the purpose of the history was for proper diagnosis and treatment, and that she relied on the history for that purpose. The questioning by the psychologist was not suggestive or leading. . . .

952 S.W.2d 817, 823 (Tenn. 1997).

Here, Ms. Speller-Brown testified that the victim was examined at Our Kids Clinic for purposes of medical diagnosis and treatment. She stated that in her capacity as a nurse practitioner at the clinic, she makes medical diagnoses, provides medical treatment, and writes prescriptions under the supervision of a pediatrician. Ms. Speller-Brown related that a clinic social worker typically takes medical histories from children the age of the victim. She testified that she relied on the medical history taken by the social worker in this instance. That Ms. Speller-Brown is a nurse practitioner rather than a physician does not render the hearsay exception inapplicable.

Citing State v. McLeod, 937 S.W.2d 867 (Tenn. 1996), the defendant also complains that the victim's medical history does not fit the Rule 803(4) hearsay exception because the victim was seen at Our Kids Clinic for purposes of evaluation, not medical diagnosis and treatment. In McLeod, our supreme court held that the trial court in one of two companion cases erred by admitting medical history provided by a child victim to a pediatrician because the "circumstances seem[ed] strongly

to indicate that the statements were not made for the purpose of medical diagnosis and treatment." Id. at 873. The pediatrician testified that she saw the victim one month after abuse allegations surfaced, that the examination was for evaluative purposes, and that she did not expect to find any physical evidence because fondling was the alleged abuse. Id. In our view, however, the ruling in McLeod does not require a finding of error in this case. Although Ms. Speller-Brown testified that Our Kids Clinic "evaluate[s] children when there are allegations of sexual abuse," she also testified that the purpose of the victim's visit, within days of the last episode of abuse, was "medical diagnosis and treatment." She stated that the victim appeared to understand the purpose of her examination and the necessity of a medical history. Ms. Speller-Brown recalled that she performed a complete physical examination of the victim, testing the victim's mouth for gonorrhea based on information that the defendant had forced the victim to perform oral sex. After examining the victim and finding no physical injuries, she recommended treatment in the form of counseling. In our view, the trial court properly admitted the medical history provided by the victim. See State v. Edwards, 868 S.W.2d 682, 699 (Tenn. Crim. App. 1993) (holding that victim's medical records were properly admitted under Tenn. R. Evid. 803(4) where victim reported only digital vaginal penetration and where treatment ultimately proved to be unnecessary).

III

Next, the defendant asserts that the trial court erred by failing to suppress his March 23, 1999, statement to Detective Peach. He contends that the statement was involuntarily made.

The trial court's determination with regard to the voluntariness and, consequently, the admissibility of the defendant's statements is binding on appeal unless the evidence preponderates against it. State v. Goforth, 678 S.W.2d 477, 479 (Tenn. Crim. App. 1984). The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V; see also Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding that the Fifth Amendment's protection against compulsory self-incrimination is applicable to the states through the Fourteenth Amendment). Article I, Section 9 of the Tennessee Constitution provides that "in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. "The significant difference between these two provisions is that the test of voluntariness for confessions under Article I, § 9 is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment." State v. Crump, 834 S.W.2d 265, 268 (Tenn. 1992).

Generally, one must affirmatively invoke these constitutional protections. An exception arises, however, when a government agent makes a custodial interrogation. Statements made during the course of a custodial police interrogation are inadmissible at trial unless the state establishes that the defendant was advised of his right to remain silent and his right to counsel and that the defendant then waived those rights. Miranda v. Arizona, 384 U.S. 436, 471-75 (1966); see also Dickerson v. United States, 530 U.S. 428, 444 (2000); Stansbury v. California, 511 U.S. 318, 322 (1994). Miranda requires that, prior to interrogation, police inform the defendant as follows: (1) He has the right to remain silent; (2) any statement that he makes may be used against him; (3) he has the right to the presence of an attorney; and (4) if he cannot hire an attorney, one will be appointed prior to

the interrogation, if he so desires. Miranda, 384 U.S. at 444. A defendant's rights to counsel and against self-incrimination may be waived as long as the waiver is made voluntarily, knowingly, and intelligently. Id. at 478; State v. Middlebrooks, 840 S.W.2d 317, 326 (Tenn. 1992). In order for an accused to effect a waiver, he must be adequately appraised of his right to remain silent and the consequence of deciding to abandon it. State v. Stephenson, 878 S.W.2d 530, 544-45 (Tenn. 1994). In determining whether a confession was voluntary and knowing, the totality of the circumstances must be examined. State v. Bush, 942 S.W.2d 489, 500 (Tenn. 1997).

Here, there is no indication that the defendant's confession was coerced or otherwise involuntary. The proof established that Detective Peach advised the defendant of his Miranda rights at the time of his arrest and later the same day prior to his interview. The defendant signed a waiver prior to indicating that he was unaware of the basis for the victim's accusations. Detective Peach and Detective Duke attempted to reinterview the defendant the next day. The officers again provided Miranda warnings and the defendant signed a second waiver form. Because the defendant appeared too despondent to make any statements, the officers ended the interview. When Detectives Peach and Duke returned the following day, the defendant asked whether the detectives had forgotten him. Again, the defendant was provided Miranda warnings and signed a waiver of rights before admitting that he had exposed himself to the victim.

By our count, the defendant had been advised of his Miranda rights no fewer than four times and had executed three separate waiver forms before making his incriminating statement. The officers voluntarily demonstrated some restraint by delaying their final interrogation until after the defendant regained his composure. While the defendant alleges that he was "crying, upset, [and] sobbing," at the time he confessed to police, he does not assert that he misunderstood his rights or that his execution of the waiver was an unknowing act. That the defendant may have been distraught does not render the confession involuntary. That Detective Peach expressed a willingness to inform the trial judge of the defendant's cooperation was not coercive. The detective made no promise of leniency, and the defendant does not claim reliance on any such promise. In our view, there is no basis for the suppression of the confession.

IV

The defendant next challenges the sufficiency of the evidence. He argues that absent the testimony of the victim and Barbara Speller-Brown, the evidence fails to support his convictions. In response, the state submits that the witnesses' testimony was properly admitted and the evidence, therefore, was sufficient.

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

Count 1 of the indictment charged the defendant with rape of a child occurring between May 1, 1998, and January 23, 1999. Rape of a child is "the unlawful sexual penetration of a victim by the defendant, if such victim is less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-522(a). "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required . . . ." Tenn. Code Ann. § 39-13-501(7).

In our view, the victim's testimony was properly admitted into evidence. She stated that the defendant got into her bed one night after she had been frightened by a storm. She recalled that she "suck[ed] [the defendant's] private" after he promised her a pet cat. She stated that incident occurred while she was living in a trailer. The testimony of Tina Litchford established that the victim lived in a trailer from approximately May of 1998 until January of 1999. The victim, whose birthdate is June 9, 1992, would have been six years of age during this time. Thus, a reasonable jury could have found the defendant guilty of a rape of a child on count 1.

In count 3 of the indictment, the defendant was charged with aggravated sexual battery occurring between January 23, 1999, and March 21, 1999. Aggravated sexual battery is "unlawful sexual contact with a victim by the defendant or the defendant by a victim" where, among other things, "[t]he victim is less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-504(a)(4). Sexual contact "includes the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification . . . ." Tenn. Code Ann. § 39-13-501(6). The victim testified that on one occasion while they were living in the apartment, the defendant placed his penis against her mouth and, ultimately, ejaculated on her leg and a blanket. The victim lived at the apartment during the time alleged in the indictment. She was still six years of age at that time. The jury accredited this testimony. Thus, the evidence supports the defendant's conviction for aggravated sexual battery.

Finally, count 4 of the indictment charged the defendant with rape of a child in March of 1999. The jury convicted the defendant of the lesser included offense of attempted rape of a child. A person commits criminal attempt when, acting with the degree of culpability otherwise required for the offense, he

(1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;

(2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or

(3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

Tenn. Code Ann. § 39-12-101(a).

At trial, the victim was unable to testify about the offense that led to the defendant's arrest. Her mother, however, provided an eyewitness account of the incident. Tina Litchford testified that she was awakened by the defendant shouting at the victim in an attempt to make her open her mouth. She stated that she observed the victim in a fetal position on the couch and the defendant, with his penis exposed, in front of her. Ms. Litchford heard the defendant call the victim by name. She testified that afterwards, the defendant told her, "Yeah, I raped your kids, and next I'll kill them." The defendant confessed to police that he exposed himself to the victim. Based on that evidence, a reasonable jury could have found that the defendant took a substantial step towards raping the victim. Because the progress of the event was halted by Ms. Litchford, however, the verdict of guilt on the offense of attempted child rape was appropriate.

V

Next, the defendant asserts that the trial court erred by failing to grant his motion for new trial on the basis of newly discovered evidence. The defendant contends that after the trial, an inmate at the jail informed him that Tina Litchford had admitted "set[ting] [the defendant] up for a fall." In response, the state submits that the trial court correctly determined that the defendant failed to demonstrate that the newly discovered evidence would have changed the result of his trial.

To warrant a new trial on the basis of newly discovered evidence, the defendant must show that (1) he used reasonable diligence to discover the information prior to trial; (2) the evidence is material; and (3) the evidence is likely to have changed the result. State v. Singleton, 853 S.W.2d 490, 496 (Tenn. 1993); State v. Goswick, 656 S.W.2d 355, 359 (Tenn. 1983). Generally, a new trial will not be granted when the newly discovered evidence would have no effect other than to impeach the testimony of a witness. See State v. Sheffield, 676 S.W.2d 542, 554 (Tenn. 1984); State v. Burns, 777 S.W.2d 355, 361 (Tenn. Crim. App. 1989). When the trial court has denied a motion for new trial based upon newly discovered evidence, that decision may not be disturbed on appeal unless there is an abuse of discretion. State v. O'Guin, 641 S.W.2d 894, 898 (Tenn. Crim. App. 1982).

After timely filing a motion for new trial, the defendant amended the motion four times, with the last amendment adding the newly discovered evidence claim. The defendant claimed that an

inmate at the Rutherford County Adult Detention Center named Phillip Stanley informed him that Tina Litchford had fabricated the allegations against him. Attached to the amended motion were four letters allegedly written by Stanley. In the first letter Stanley asserted that he met Tina Litchford while he was "working undercover for the Murfiesboro [sic] Police Dept." In addition to otherwise irrelevant information, the two-page document contains the following:

> Is your name Steve? . . . [A]re you the person . . . here on a child rape case involving a . . . girl named Tina Li[t]chford[?] She has a daughter named [TL]? Well if you are[,] and I think you are[,] you need to know some things about your case. Man you got set up! . . . [Tina] told me that she had a boyfr[ie]nd that she couldn't get rid of. That she set up for a fall. But she didn't mean for it to get out of hand. But now the prosecutors are threatening jail time for her if she don't follow through cause she is gonna make them all look stupid after already arresting you and making these allegations against you. She also told me she was meeting with the prosecutor on several oc[c]asions and trying to rehearse the child on what to say and she would only shake her head yes and no. That's when they kept coming to you with a deal. They were scared to put her on the stand. Afraid she would blow the whole thing and make them all look stupid. Steve I know you didn't do that stuff. Tina told me so. And she also said she tried to get out of prosecuting you. That's why she would still try and talk to you. But the Distric[t] Attorney had her scared about losing the kids and jail time herself.

The remaining three letters contain no relevant information. Stanley was not available to testify at the motion for new trial.

In denying the defendant's motion for new trial on newly discovered evidence grounds, the trial court ruled as follows:

> The basis of these assertions [is] a series of four letters allegedly received by the [d]efendant from one Phillip Stanley who had been incarcerated in the Rutherford County Detention Center from November 26, 1999 through March 22, 2000. When hearings were held on the Motions for New Trial Mr. Stanley had been released from custody and had absconded from supervised probation. He has never testified in these proceedings nor are there affidavits to support these claims. In order to obtain a new trial based on newly discovered evidence, the [t]rial [c]ourt must be convinced that the [d]efendant has shown reasonable diligence, that the newly discovered evidence is material, and that the evidence was likely to change the result of the trial if accepted by a jury. . . . It would be hard for this [c]ourt to find any of the three prerequisites set forth above have been met, as the source and veracity of these letters are seriously in question. . . .

In our view, the trial court's determination of this issue did not constitute an abuse of discretion. Even if Stanley's allegations were unavailable to the defense prior to trial, the defendant

has failed to demonstrate that the evidence is material or likely to change the result of his trial if presented to a jury. Initially, none of the newly discovered evidence presented by the defense falls within an exception to the rule against hearsay. As the trial court correctly noted, the "source and veracity of the[] [four] letters are seriously in question." Two of the letters have dissimilar handwritings and are unsigned. The other two letters are signed only "Phillip." Of particular note is that the author repeatedly asks that his identity not be revealed, lest he be killed. None of the letters are dated. In one of the letters, the author asks that the content not be shown to anyone until after February 28. The record establishes that because Stanley was incarcerated until March 22, the defendant would have had an opportunity to preserve his testimony through a sworn statement or an affidavit. Defense counsel, a public defender, explained that because the public defender's office also represented Stanley, he did not believe that he could contact Stanley until after April 11, when the conflict was resolved. In our view, that could not qualify as an excuse. Moreover, the implication that Tina Litchford had coached the victim was brought out by the defense at trial. Newly discovered evidence in the form of mere impeachment testimony does not typically qualify as a ground for a new trial. State v. Arnold, 719 S.W.2d 543, 550 (Tenn. Crim. App. 1986); State v. Lequire, 634 S.W.2d 608, 615 (Tenn. Crim. App. 1982).

VI

Next, the defendant argues that the trial court erred by failing to grant a new trial on the basis of prosecutorial misconduct. The state contends that the issue was waived, that there was no prosecutorial misconduct, and that any improper argument was not prejudicial to the defense.

In an amendment to his motion for new trial, the defendant filed five handwritten legal-sized pages containing 13 instances of alleged prosecutorial misconduct occurring during voir dire and closing argument. In ruling on the motion, the trial court determined that only one of the cited instances constituted improper argument:

> The vast majority of these comments which [the assistant district attorney] made to the jury are reasonable interpretations of the facts and are proper. One comment, however, appears not to be supported by the trial proof. During the rebuttal phase of [the assistant district attorney's] argument he made the following statement:
>
> > Well, what reason did they put the [d]efendant's mother on the stand? What did she see? Absolutely nothing. Nothing that helps you decide this case. If anything she confirmed everything Tina said. She overheard Tina's argument. She overheard Tina say that he was trying to get her to open her mouth, that he was exposed. What other motive did they have to put his mother on?
>
> Although the [d]efendant's mother initially adopted a statement which confirmed that she overheard Tina say that he was trying to get her to open her mouth, the mother, during her direct testimony, recanted that portion of her statement. Therefore, no trial proof existed from [d]efendant's mother to support this portion of the argument.

(Emphasis in original). The trial court denied a new trial because it found that the "complained of conduct was not prejudicial to the [d]efendant."

Initially, the defendant made only one contemporaneous objection during the state's final argument. During the state's rebuttal, defense counsel objected to the assistant district attorney's characterization of defense counsel's summarization of the applicable law. In that regard, the remaining issues, including the particular question here, have been waived. See Tenn. R. App. P. 36(a). It has been firmly established that objections must be made to an improper jury argument in order to preserve the issue for appellate review; otherwise, any improper remarks by the state would afford no ground for a new trial. State v. Duncan, 698 S.W.2d 63, 70 (Tenn. 1985); State v. Compton, 642 S.W.2d 745, 747 (Tenn. Crim. App. 1982). Further, the only ground of prosecutorial misconduct argued in the defense brief is the erroneous statement of the proof found by the trial court. Thus, all other grounds have been waived. See Tenn. Ct. Crim. App. 10(b); State v. Price, 46 S.W.3d 785, 825 (Tenn. Crim. App. 2000).

In our view, the trial court did not err by denying the defendant's motion for new trial on this issue. In Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976), this court established five factors to be considered in determining whether alleged instances of prosecutorial misconduct might have affected the verdict to the prejudice of the defendant:

> (1) the conduct complained of in context and in light of the facts and circumstances of the case;
> (2) the curative measures undertaken by the court and the prosecution;
> (3) the intent of the prosecutor in making the improper statements;
> (4) the cumulative effect of the improper conduct and any other errors in the record; and
> (5) the relative strength or weakness of the case.

Certainly, the state should not argue facts which are not supported by the evidence. In this case, however, the defendant's mother had initially signed a written statement which included, "Steven was telling [TL] to open her mouth." Although at trial she denied having conveyed that information to officers, her statement was admitted as evidence and made part of the record. There is no indication that the prosecutor's misstatement of Ms. Foster's trial testimony was intentional. Moreover, the state's case against the defendant was particularly strong and included a confession on one of the charges. Any error on the part of the prosecutor did not result in prejudice.

VII

The defendant next contends that the trial court erred by not granting a mistrial after a potential juror made a comment during voir dire about pedophile recidivists. The state submits that the defendant's request for a mistrial, which was made after the jury was accepted and sworn was untimely.

The purpose of a mistrial is to correct the damage done to the judicial process when some event has occurred which would preclude an impartial verdict. See Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). The decision whether to grant a mistrial is within the trial court's discretion and will not be disturbed absent an abuse of that discretion. State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). "Generally a mistrial will be declared in a criminal case only when there is a 'manifest necessity' requiring such action by the trial judge." Id. The authority to discharge a jury is to be exercised only when there is a cogent reason or manifest necessity. Jones v. State, 218 Tenn. 378, 403 S.W.2d 750, 754 (1966).

In response to questioning by the assistant district attorney, the following exchange took place with prospective Juror Dodd:

> GEN. HOLCOMBE: Now, in that same vein, does anyone know anyone, personally know anyone, who has been charged with a sexual abuse crime?
>
> * * *
>
> GEN. HOLCOMBE: Mr. Dodd, was that someone that was close to you?
>
> THE JUROR: No.
>
> GEN. HOLCOMBE: Do you know what happened as a result of those charges?
>
> THE JUROR: I work in the field of treating people who have committed pedophilic acts. I've never seen them get well.

Later, defense counsel elicited further information from Dodd:

> [DEFENSE COUNSEL]: But is there anything[] about your background as a counselor that you think might impact upon your ability to be fair and impartial, not only to Mr. Gass but to the State of Tennessee.
>
> THE JUROR: I do not treat and refuse to treat anyone who has committed a pedophilic act in my own work. I do not believe that would affect my work here.

The juror was ultimately removed from the panel by a peremptory strike.

After the jury had been sworn, after opening statements, and after a recess for lunch, defense counsel moved for a mistrial on the grounds that prospective Juror Dodd's comments regarding pedophiles had prejudiced the entire jury panel. The trial court denied the motion:

> [Juror Dodd] was excused, and we're making a quantum leap between the fact that Mr. Dodd has expressed his view as to how it applies to this individual Defendant who has pled not guilty to all charges and is presumed not guilty.
>
> So, in addition, sometimes I'm wondering if jurors and citizenry in general would understand the terminology pedophile. I know I've had an occasion to talk to some folks who didn't recognize that term. So at this point in time and for all purposes, this motion is overruled.

In ruling on this issue in the context of the defendant's motion for new trial, the trial court determined that there was no evidence that the jury panel was influenced by potential Juror Dodd's comments.

Initially, the defendant's brief contains no argument or citation of authorities. Accordingly, this court considers the issue waived. See Tenn. Ct. Crim. App. 10(b); Price, 46 S.W.3d at 825. More importantly, however, this issue has been waived by the failure to make a contemporaneous objection or motion for mistrial. See State v. Lockhart, 731 S.W.2d 548, 550 (Tenn. Crim. App. 1986) (holding that defendant had waived issue of prejudicial remark made by prospective juror during voir dire where defense counsel had failed to make contemporaneous objection or motion for mistrial), overruled on other grounds by State v. Rickman, 876 S.W.2d 824 (Tenn. 1994); State v. James Cohea, No. 89-57-III (Tenn. Crim. App., at Nashville, Oct. 17, 1989) (holding that failure to move for mistrial based on prospective juror's prejudicial comment until after jury was sworn constituted waiver of the issue). Furthermore, there is no indication in this record that the jury that heard this case was prejudiced or biased against the defendant as a result of potential Juror Dodd's statement. See State v. Brown, 795 S.W.2d 689, 696 (Tenn. Crim. App. 1990).

VIII

Finally, the defendant argues that he should be granted a new trial on the basis of cumulative error. The state responds that this issue has been waived by the defendant's failure to raise it in his motion for new trial. Because this court has found no error of substance on the part of the trial court, cumulative error would not serve as a basis for relief.

Accordingly, the judgments of the trial court are affirmed.

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GARY R. WADE, PRESIDING JUDGE